

Order 98-4-31

Served: May 6, 1998



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 30th day of April, 1998

Joint Applications of

**KIWI INTERNATIONAL AIR LINES, INC.
and
KIWI INTERNATIONAL HOLDINGS, INC.**

Docket OST-97-2684

for a transfer of section 41102 certificate under 49 U.S.C.
41105

**CONFIRMING
ORDER TRANSFERRING
AND REISSUING CERTIFICATE**

Summary

By this order, we confirm our oral action of July 23, 1997, (1) finding that Kiwi International Holdings, Inc. (KIH) is a citizen of the United States and is “fit, willing, and able” to operate the interstate scheduled air transportation authorized by Kiwi International Air Lines, Inc.’s (Kiwi) section 41102 certificate and (2) transferring and reissuing to KIH the authority of Kiwi.

Background

Kiwi, headquartered in Newark, New Jersey, was incorporated in March 1992 under New Jersey State laws. By Order 92-9-67, September 29, 1992, Kiwi was issued effective certificate authority to perform interstate scheduled passenger service.¹ The carrier commenced operations under that authority with Boeing 727-200 aircraft providing scheduled passenger service between Newark and Atlanta, Orlando, Chicago, and Fort Lauderdale. It subsequently instituted charter passenger operations.

¹ At that time, majority ownership of the company was divided among some of its founders, Codie Bell, Robert Iverson, and David Bell, and certain of its employees.

On September 30, 1996, Kiwi filed for Chapter 11 bankruptcy protection, and on October 15, 1996, it suspended the scheduled passenger service portion of its operations, continuing only its charter passenger operations.

While remaining under the protection of the bankruptcy court, Kiwi resumed scheduled passenger service on January 20, 1997, performing that service to and from Newark, Atlanta, Chicago (Midway), and West Palm Beach utilizing eight leased 150-seat Boeing 727 aircraft.

In 1997, KIH was formed for the purpose of acquiring Kiwi's assets by Dr. Charles Edwards,² an orthopedic surgeon and businessman. KIH, incorporated under the laws of the State of Maryland, is 98 percent owned by Dr. Edwards. Once incorporated, KIH entered a bid with the bankruptcy court to purchase Kiwi's assets.

On July 3, 1997, Kiwi and KIH filed a joint application in Docket OST-97-2684 requesting that the Department approve a transfer of Kiwi's section 41102 certificate to KIH. In support of their request, the companies stated that, in addition to transferring Kiwi's assets, all of its operations and management would be transferred to KIH and there would be no substantial changes in the current officers and key management personnel. In order for KIH to continue the operations of Kiwi without interruption after the assets were transferred to KIH, the companies requested that the Department approve the certificate transfer concurrently with the bankruptcy court's approval of the asset sale.³

After reviewing the supporting fitness information furnished in the joint application, we concluded that the proposed transfer would have no adverse impact on the surviving corporation's fitness and that it would be in the public interest for the certificate issued to Kiwi by Order 92-9-67 to be transferred and reissued to KIH. On July 23, we were advised of the bankruptcy court's approval of the sale and transfer of Kiwi's assets to KIH,⁴ and hence, on July 23, we orally approved the transfer to become effective on that date. We confirm that action here.

In October 1997, KIH and NJS Acquisition Corporation, a Delaware company, entered into an agreement under which NJS will acquire 20 percent of KIH's stock for \$3.5 million. Under the proposed transaction, NJS will form a wholly-owned subsidiary,

² In November 1996, Dr. Edwards, through Edwards-Wasatch Enterprises, provided \$8.5 million (in cash and letters-of-credit) in debtor-in-possession financing to Kiwi.

³ The companies requested a shortened answer period to the joint application so that answers would be due by close of business on July 8, 1997. In light of the need for timely action on this matter, we issued a notice on July 7 that granted the applicant's request and shortened the answer period as noted. We received no answers to the transfer application.

⁴ The companies' joint application indicated that according to section 363 of the Bankruptcy Code, the proceeds from the asset sale will be used to satisfy certain secured claims and the balance of Kiwi's assets remaining in the estate will be distributed to creditors. Kiwi's estate will thereafter be liquidated.

“Merger Sub”, that will merge into KIH. As part of the merger, all of the outstanding shares of KIH common stock held by Dr. Edwards (98 percent) and Mr. Elliot Sharaby (2 percent)⁵ will be exchanged for new shares of NJS, leaving Dr. Edwards and Mr. Sharaby holding 78 percent and 2 percent, respectively, of NJS common stock. Of the remaining 20 percent, Mr. Nicholas Seccafico and Mr. Lindo Garuffi (the current owners of NJS) will own 3 percent and 2 percent, respectively, of NJS common stock, and 15 percent will be publicly traded. After the merger is complete, NJS intends to file a registration statement with the Securities and Exchange Commission and once effective, NJS will apply to list its shares on the NASDAQ.

Post merger, NJS will function as a holding company and KIH will become its sole wholly-owned subsidiary.

FITNESS

Managerial Competence

As a result of Kiwi’s asset sale, all of its current officers and key management personnel were transferred to KIH. These individuals intend to remain with KIH after the acquisition of stock by NJS.

KIH’s current managers are Mr. Jerry Murphy, President and Chief Executive Officer; Mr. Daniel Chain, Director of Quality Assurance and Engineering; Mr. Steven Markhoff, General Counsel; Mr. James Hensen, Director of Operations; Mr. Joseph Tams, Chief Pilot; Mr. John Matera, Director of Maintenance; Mr. Andrew Brixner, Director of Safety; and Mr. Scott Held, Director of Flight Training.

Taking into consideration the experience and background of KIH’s key personnel and the fact that most of these individuals held the same or similar positions with Kiwi, we conclude that they have the management and technical ability to oversee KIH’s daily certificated operations.

Operating Proposal and Financial Condition

KIH indicated in the joint application that it would continue to provide the scheduled passenger operations that were being conducted by Kiwi. KIH operates eight 150-seat Boeing 727 aircraft in scheduled passenger service at Newark, Chicago, Atlanta, Orlando, West Palm Beach, Las Vegas, and Boston, and on a seasonal basis, San Juan. In addition, KIH plans to begin offering scheduled passenger service between Newark and Tampa in the near future.

KIH provided a balance sheet as of December 31, 1997, that indicates the company has a satisfactory financial posture. It showed total assets of \$32.8 million, current assets of

⁵ Mr. Elliot Sharaby is a business associate of Dr. Edwards.

\$13.2 million, current liabilities of \$19.8 million, a current ratio of .67 to 1, and total stockholders' equity of \$537,371. It has long-term debt of \$7.5 million.

In light of the above, it appears that KIH has sufficient financial resources to conduct its services without posing an undue risk to consumers or their funds.

Compliance Disposition

KIH has stated that there have been no formal complaints filed or orders issued finding it, its owners, officers, or key personnel in violation of the statute; nor have any charges of unfair, deceptive or anti-competitive business practices, or of fraud, felony or antitrust violations been brought against them. KIH further stated that there are no actions or outstanding judgments filed against it, its owners, officers, or key personnel.

The FAA has stated that Kiwi's air carrier certificate and operations specifications were transferred to KIH on July 23, 1997. Moreover, the FAA advised us that it knew of no reason why we should act unfavorably on the joint application for certificate transfer. It further advised us that the company's key technical personnel are properly qualified. We examined the Department's records and have found that no actions have been taken by the FAA against KIH, its owners, officers, or key personnel involving civil penalties or certificate action.

We do note, however, that on March 25, 1998, the Department issued a consent order (Order 98-3-25) against Kiwi and KIH, as Kiwi's successor company, concerning Kiwi's failure to file required reports in a timely manner. The settlement directs both carriers to cease and desist from such violations and provides for the assessment of a civil penalty. The Department uses carriers' reports to monitor carrier fitness and ownership, to analyze the effects of air transportation industry policy initiatives, to allocate airport development funds, to forecast traffic, to develop airport and airway traffic policy, and to meet other regulatory responsibilities. Thus the Department views the failure by a carrier to file reports on time as a very serious matter.

The Office of Aviation Enforcement and Proceedings has advised us that they do not have any outstanding concerns about the compliance disposition of KIH. We are, by this order, advising KIH that we intend to monitor its compliance with the Department's reporting requirements to ensure that KIH retains the proper disposition to comply with orders and regulations.

CITIZENSHIP

Section 41102 requires that certificates to engage in air transportation be held only by citizens of the United States as defined in 49 U.S.C. 40102(a)(15). That section requires that the president and two-thirds of the Board of Directors and other managing officers be U.S. citizens and that at least 75 percent of the outstanding voting stock be owned by U.S. citizens. We have also interpreted the statute to mean that, as a factual matter, the carrier must actually be controlled by U.S. citizens.

Once the proposed transaction between KIH and NJS is complete, KIH will become a wholly-owned subsidiary of NJS. Dr. Charles Edwards will own 78 percent, Mr. Elliot Sharaby will own 2 percent, Mr. Nicholas Seccafico will own 3 percent, Mr. Lindo Garuffi will own 2 percent, and 15 percent will be publicly traded. KIH has provided an affidavit attesting that it is a U.S. citizen and has affirmed that all of its owners, officers,⁶ and key personnel are U.S. citizens. Furthermore, there is nothing in the record that would lead us to conclude that control of KIH is not with citizens of the United States.

In view of the foregoing, we conclude that KIH is a citizen of the United States and is fit, willing, and able to provide scheduled passenger operations as a certificated air carrier.

CERTIFICATE LIMITATIONS

Our findings stated above in connection with the transfer transaction were based on the description in the joint application that KIH would be utilizing eight Boeing 727-200 aircraft to continue providing the scheduled passenger operations that were being conducted by Kiwi. Our findings might no longer apply if KIH were to substantially change the scope of its operations through the introduction of additional aircraft. Therefore, should KIH propose to acquire aircraft which would expand the number of its aircraft fleet to more than 10 aircraft, it must notify the Department in writing at least 45 days in advance of acquiring those aircraft and demonstrate its fitness for such operations prior to implementing service with those aircraft.

Public Interest

Section 41105 of the statute permits the Department to approve a certificate transfer if we find that the transfer is consistent with the public interest. The primary decisional criterion in determining the public interest is whether the surviving company is fit, willing, and able to operate. Moreover, section 41105(b) requires the Secretary to analyze the impact of the transfer on the viability of the carrier applicants, competition in the domestic airline industry, and the trade position of the United States in the international air transportation market.

⁶ KIH's Board Chairman is Dr. Edwards and its directors are Messrs. John G. Murphy, James E. Player, James R. Sexton, and Nicholas J. Seccafico.

After carefully reviewing the applicant's pleadings and other data available to the Department, we found that the transaction warranted approval under the decisional criteria. As discussed above, we find that KIH meets the fitness test to provide the air transportation authorized by Kiwi's certificate.

In addition, approval of this transfer will have a positive effect on competition in the domestic airline industry and on the U.S. international trade market as the surviving company is in a better position financially to continue the operations performed previously by Kiwi.

Accordingly, we concluded that it was in the public interest for the certificate issued to Kiwi by Order 92-9-67 to be transferred and reissued to KIH, and orally approved the transfer on July 23, 1977.

ACCORDINGLY,

1. We confirm our oral action of July 23, 1997, that (1) found Kiwi International Holdings, Inc., fit, willing, and able to operate the interstate scheduled air transportation authorized by Kiwi International Air lines, Inc.'s section 41102 certificate, and (2) transferred to Kiwi International Holdings, Inc., under 49 U.S.C. 41105, the interstate scheduled air transportation certificate issued to Kiwi International Air Lines, Inc., by Order 92-9-67, and we reissue the certificate in the attached new form in the name of Kiwi International Holdings, Inc. d/b/a Kiwi International Air Lines, Inc., to reflect the transfer of authority.
2. Should KIH propose to expand the number of its aircraft fleet to more than 10, we direct it to notify the Department in writing at least 45 days in advance and demonstrate its fitness for such operations prior to implementing service with those aircraft.
3. We will serve a copy of this order on the persons listed in Attachment A.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
<http://www.dot.gov/dotinfo/general/orders/aviation.html>.*



**Certificate of Public Convenience and Necessity
for
Interstate Air Transportation**

(as reissued)

This Certifies That

**KIWI INTERNATIONAL HOLDINGS, INC.
d/b/a
KIWI INTERNATIONAL AIR LINES, INC.**

is authorized, subject to the provisions of Subtitle VII of Title 49 of United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in interstate air transportation of persons, property, and mail.

This Certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

**Issued by Order 98-4-31
On April 30, 1998
Effective on July 23, 1997**

**Charles A. Hunnicutt
Assistant Secretary for Aviation
and International Affairs**



Terms, Conditions, and Limitations

KIWI INTERNATIONAL HOLDINGS, INC.
D/B/A
KIWI INTERNATIONAL AIR LINES, INC.

is authorized to engage in interstate air transportation of persons, property, and mail between any point in any State, territory, or possession of the United States or the District of Columbia, and any other point in any of those entities.

This authority is subject to the following provisions:

- (1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.
- (2) The holder's authority under this certificate is effective only to the extent that such operations are also authorized by the Federal Aviation Administration.
- (3) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).
- (4) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.

*This certificate is being reissued to reflect (1) the transfer of authority from Kiwi International Air Lines, Inc., to Kiwi International Holdings, Inc. d/b/a Kiwi International Air Lines, Inc.

- (5) The holder may reduce or terminate service at any point or between any two points, subject to compliance with the provisions of 49 U.S.C. 41734 and all orders and regulations issued by the Department of Transportation under that section.
- (6) The holder may not provide scheduled passenger air transportation to or from Dallas (Love Field), Texas, except within the limits set forth in section 29 of the International Air Transportation Competition Act of 1979, as amended by section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998.
- (7) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.
- (8) In the event that the holder ceases all operations for which it was found "fit, willing, and able," its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may not recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

SERVICE LIST FOR
KIWI INTERNATIONAL AIR LINES, INC.

Attachment A

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